No. 94-972

In The

Supreme Court of the United States

October Term, 1994

TRI-STATE MACHINE, INC.,

Petitioner,

v.

NATIONWIDE LIFE INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND PROPOSED BRIEF OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUSAN E. MARTIN, ESQ.
General Counsel of the
National Association of
Insurance Commissioners
Counsel of Record for Amicus
Curiae, In Support of Petitioner
120 West 12th Street, Suite 1100
Kansas City, MO 64105
(816) 842-3600

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MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE

The National Association of Insurance Commissioners (NAIC), through its counsel, respectfully moves this Honorable Court for leave to file a brief of *amicus curiae* in the form attached hereto in support of Petitioner Tri-State Machine, Inc.'s Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit now pending in this Honorable Court. In support for this motion, the NAIC states the following:

1. This motion for leave to file a brief of *amicus curiae* is required by Rule 37.2 of the Rules of the Supreme Court because the written consent of all parties to the filing of the brief of *amicus curiae* has not been granted. Petitioner Tri-State Machine, Inc. has consented to the filing of this brief. Respondent Nationwide Life Insurance Company has been contacted by the undersigned counsel for the NAIC and its consent has been requested; however, Respondent has refused to consent to the filing of this brief.

2. The objective of the NAIC is to serve the public interest by assisting its members, the chief insurance supervisory officials of the fifty States, the District of Columbia, the territories and the insular possessions of the United States, in promoting the fair, just and equitable treatment of insurance consumers and claimants, the reliability of the insurance institution as to solvency, financial solidity and guaranty against loss, and the maintenance and improvement of State regulation of insurance.

Accordingly, the interest of the members of the NAIC in this matter is great because of the significant ramifications for the regulation of the business of insurance in all jurisdictions and the potential effects that this decision may have on insurance consumers whose interests the members of the NAIC, through this motion, seek to protect.

3. The NAIC respectfully urges that the Court should be apprised of the interest of the fifty-five members of the NAIC in this matter because the West Virginia Unfair Trade Practices Act, which is a primary issue in the case, is based upon the NAIC Model Unfair Trade Practices Act. The Model also forms the basis for similar statutes in a majority of the States. The decision by this Court will impinge insurance regulation and insurance consumer protection in all jurisdictions.

4. The interests of the NAIC are described in detail in the attached proposed brief of *amicus curiae,* incorporated herein by reference.

For these reasons and as more fully described in the attached proposed brief, the National Association of Insurance Commissioners, through its counsel, respectfully requests leave to file the attached brief of *amicus curiae.*

Respectfully submitted,

Susan E. Martin, Esq.
General Counsel for the National Association of Insurance Commissioners
120 West 12th Street, Suite 1100
Kansas City, MO 64105
(816) 842-3600

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IDENTITY OF AMICUS CURIAE

The National Association of Insurance Commissioners (NAIC) is a non-profit, unincorporated association whose membership consists of the commissioners, directors, superintendents, or other officials who are charged by law with the principal responsibility of supervising the business of insurance in 50 states, the District of Columbia, the territories and the insular possessions of the United States.

The goal of the NAIC, set out in its Constitution, is to serve the public by assisting these insurance supervisory officials in achieving these fundamental objectives:

1. Promotion of the public interest through the regulation of insurance and the fair, just and equitable treatment of insurance consumers and claimants;

2. Reliability of the insurance institution as to solvency, financial solidity and guaranty against loss; and

3. Maintenance and improvement of State regulation of insurance in a responsive and efficient manner.

NAIC Constitution, Article II. Amended 1993 Proc. Second Quarter, 19.

One of the most important services the NAIC provides for its members is the development and drafting of model statutes and regulations. These models are intended to serve only as guideposts for members to assist them in presenting appropriate insurance legislation for enactment in the various state legislatures and in adopting appropriate regulations for more efficient and effective regulation of insurance in the states.

INTEREST OF THE AMICUS CURIAE

The NAIC is interested in filing this brief in furtherance of its goal as articulated above. Furthermore, the NAIC Executive Committee, which is comprised of seventeen state insurance officials from all regions of the United States, voted to file a brief of *amicus curiae* in this case on behalf of all fifty-five members of the NAIC. The interest of the NAIC in filing this brief is based on the premise that the U.S. Congress intended, by enacting the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, that the States shall have the exclusive authority to regulate the business of insurance. The NAIC was a principal participant in the drafting and debate of the McCarran-Ferguson Act. Its members historically have supported state regulation of insurance against expansive preemption by federal laws because " . . . the continued regulation and taxation by the several States of the business of insurance is in the public interest, and . . . silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* After the enactment of the McCarran-Ferguson Act in 1945 (Public Law 15, 79th Congress), the NAIC initiated efforts to develop state legislation regulating insurer trade practices. The NAIC considered it extremely important to establish unequivocally the intent of state legislatures to occupy the field of state regulation of insurer trade practices. 1946 NAIC Proc. 145, 148.

In 1947, the NAIC adopted its Model Unfair Trade Practices Act. In the intervening years, the NAIC has amended this Model Act to strengthen regulation of

insurer trade practices; however, its primary purpose has remained substantially unchanged:

"The purpose of this Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945, (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state that constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined . . . "

1993 NAIC Proc. I 246-254 (amended and reprinted).

Almost all the various States have adopted the NAIC Model Unfair Trade Practices Act or legislation that is considered similar to the Model. The West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-1 *et seq.*, although different in some respects, is based on the NAIC Model.

Consistent with its objectives and its historical positions, the NAIC has an interest in minimized federal involvement in state regulation of the business of insurance. The decision of the Fourth Circuit in this case has a significant impact on the capacity and ability of the members of the NAIC to regulate the business of insurance in the various States. Several areas of traditional state regulation are impinged by the decision, including regulation of the sale of insurance products, regulation of the relationship between an insurer and an insured, and state law jurisdiction over insurer trade practices. The decision expands preemption by the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1001, *et seq.*, to

encompass insurer practices without regard for applicable state laws designed to protect insurance consumers from unfair and fraudulent practices.

The case should be heard by the Supreme Court of the United States because of its significant impact on state regulation of the business of insurance and state insurance laws in the various States. The case presents questions of important public concern. States have an interest in regulating the activities of insurers. Each State has a specific scheme to regulate the business of insurance within its jurisdiction. These state schemes differ according to the needs of the insurance consumers of the states. However, consistent among these state schemes is the regulation of insurer trade practices. The States have occupied the field of regulation of insurer trade practices. The decision of the Fourth Circuit would exclude the States from a major portion of that field – the relationship between an insurer and an insured – leaving aggrieved insurance consumers without appropriate state remedies.

SUMMARY OF ARGUMENT

The NAIC considers that there are three issues raised by the decision of the Fourth Circuit that are very important to its members and its objectives:

1. Is the West Virginia Unfair Trade Practices Act an insurance law within the meaning of "the business of insurance" in the McCarran-Ferguson Act?

2. Does proper interpretation of the "Relate To" Clause of the preemption provision of ERISA and the

"Saving" Clause of ERISA exempt state laws regulating insurer trade practices from the preemption clause of ERISA?

3. Does the "Deemer" Clause of ERISA apply to an employee benefit plan funded by an insurance policy, which policy contained a stop-loss provision, causing the plan to be self-funded in part, thus saving from preemption a state law regulating insurer trade practices?

These issues are answered in the affirmative by evaluating the various applicable provisions of the McCarran-Ferguson Act and ERISA and by analyzing the bodies of case law which have arisen as a result of enactment of both federal laws.

The term "the business of insurance" contained in the McCarran-Ferguson Act includes the relationship between an insurer and an insured. The West Virginia Unfair Trade Practices Act, like the NAIC Model Unfair Trade Practices Act, is a law regulating the relationship between an insurer and an insured. That relationship includes the gathering, compiling, and analyzing of claims data by the insurer for the purpose of determining premiums which shall be charged to the insured pursuant to the insurance policy, as in this case.

The "Relate To" clause of the preemption provision of ERISA does not encompass elements of the underlying relationship created through the issuance and delivery of an insurance policy between an insurer and an insured which funds an employee benefit plan.

Finally, the "Deemer" clause excludes self-funded plans from the "Saving" clause of ERISA. The insurance

policy at issue in this case is a policy which funds an employee benefit plan and which has stop-loss provisions capping premium obligations of the insured. The presence of these stop-loss provisions does not render the plan self-funded.

ARGUMENT

I. BACKGROUND

Tri-State Machine, Inc., Petitioner, contracted with Nationwide Life Insurance Company to provide a combination life, health and disability insurance policy to fund Petitioner's employee benefit plan. Premiums were calculated according to a funding agreement. Premium obligations of Petitioner generally were based on claims of Petitioner's employees; however, Petitioner's premium obligations were limited to an annual maximum amount, a provision that might be found in a stop-loss policy. After a number of years in this relationship, Nationwide was required to report to Petitioner claims information and to recalculate Petitioner's premium obligations. In so doing, Nationwide is alleged to have improperly manipulated claims information and to have violated the funding agreement, resulting in a premium increase billed to Petitioner and a recoupment of funds for Nationwide.

Petitioner initially brought suit in a West Virginia state court alleging breach of contract, breach of implied covenant of good faith and fair dealing, statutory "bad faith," and violation of various West Virginia insurance laws. The suit was removed to the United States District Court for the Northern District of West Virginia based on

diversity and on Nationwide's response to the suit which alleged that all the claims of Petitioner were preempted by ERISA.

After some procedural issues were resolved, the trial court issued a final order finding that Petitioner's state law causes of action were preempted by ERISA. The Fourth Circuit affirmed the trial court finding that Petitioner's claims "related to" an ERISA plan, the state insurance laws alleged to be applicable were not "saved" from preemption, the Petitioner's employee benefit plan was a self-funded plan to which the "deemer" clause of ERISA applied, and the West Virginia Unfair Trade Practices Act was not an insurance law as contemplated by the McCarran-Ferguson Act and thus its application in this case was preempted by ERISA. *Tri-State Machine, Inc. v. Nationwide Life Ins. Co.*, 33 F.3d 309 (4th Cir. 1994).

Petitioner has timely filed its Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit in the Supreme Court of the United States.

II. MCCARRAN-FERGUSON ACT AND ERISA PREEMPTION

Although it is clear that Congress may invoke federal supremacy and supplant state statutes and common law with federal law, Congress has also clearly reserved the regulation of the business of insurance to the states. ERISA's preemption provisions are expansive, but they cannot and do not provide for unlimited preemption of state laws in matters relating to the business of insurance.

In 1945, primarily in response to this Court's decision in *United States v. South-Eastern Underwriters Ass'n* (322 U.S. 533, *reh. denied,* 323 U.S. 811 (1944)), the Congress passed the McCarran-Ferguson Act, declaring that "the business of insurance, and every person engaged therein, shall be subject to the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a).

The Congress went on in the Act to emphasize the important public purpose for this reservation to the States stating in part that " . . . the continued regulation and taxation by the several States of the business of insurance is in the public interest, and . . . silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011.

Furthermore, Congress imposed limitations on itself in the Act declaring that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

The McCarran-Ferguson Act is unique among federal laws in its delegation of exclusive authority to the States to regulate the business of insurance.[1] The Act is not unique, however, in that the lack of specificity contained

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[1] Jonathan R. Macey, Geoffrey P. Miller, *Costly Policies: State Regulation and Antitrust Exemption in Insurance Markets,* AEI Studies in Regulation and Federalism, 1993, p. 2.

therein has given rise to a very large body of case law developed over the years since its enactment which attempts to define what the Congress meant in making such sweeping statements about "the business of insurance."

Case law has defined what is meant by "the business of insurance" as contemplated by the McCarran-Ferguson Act. Antitrust cases have identified several elements which are common to "the business of insurance."[2]

- Risk spreading: If an activity has the effect of transferring or spreading a policyholder's, or an insured's risk, then the activity is considered "the business of insurance" subject to regulation by the States. *Union Labor Life Insurance Co. v. Pireno,* 458 U.S. 119, 129 (1982).

- Relationship to an insurance policy: If an activity is an "integral part of the policy relationship between the insurer and the insured," then it is "the business of insurance" subject to regulation by the States. *Id.* at 126.

- Intra-industry activity. If an activity is "limited to entities within the insurance industry," it is deemed "the business of insurance." *Group Life & Health Insurance Co. v. Royal Drug Co.,* 440 U.S. 205, 224 (1979). This criteria is premised upon the legislative history of

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[2] In a recent case, not an anti-trust case, this Court referred to the McCarran-Ferguson Act as "restor[ing] the supremacy of the States in the realm of insurance regulation." *United States Dept. of the Treasury v. Fabe,* ___ U.S. ___, 113 S.Ct. 2202, 2207 (1993).

the McCarran-Ferguson Act and is primarily responsible for the narrowing of case law in determinations of "the business of insurance."

The application of these elements to a fact situation will not always result in consistent or predictable results. Additionally, the application of ERISA to the fact situation further complicates the analysis.

The preemption provision of ERISA reads as follows: "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may not or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)." 29 U.S.C. § 1144(a). ERISA was enacted to encourage employer-sponsored employee benefit plans by defining and limiting the claims and remedies that are exclusively available to plan beneficiaries and participants. The preemption provision cited above was designed to minimize the burden of compliance by plans and their employer-sponsors with conflicting state laws.

The "relate to" clause of the preemption provision of ERISA should not be read to encompass traditional areas of state regulation. ERISA prescribes specific remedies which are exclusively available to plan beneficiaries and participants. In some cases, employer-sponsors were left without remedies because the ruling court held that the claims were preempted, but there was no remedy prescribed by ERISA. *See, e.g., Farlow v. Union Cent. Life Ins. Co.*, 874 F.2d 791, 794 (11th Cir. 1989), and *Consolidated Beef Indus. v. New York Life Ins. Co.*, 949 F.2d 960, 964 (8th Cir. 1991) *cert. denied*, ___ U.S. ___, 112 S.Ct. 1670 (1992).

The more rational approach, and the approach which is consistent with the intent of Congress in the McCarran-Ferguson Act, is the approach which limits the preemptive effect of the "relate to" clause to benefits administration and processing issues. *See, e.g., Airparts Co., Inc. v. Custom Benefit Services of Austin, Inc.*, 28 F.3d 1062 (10th Cir. 1994), and *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1990). These courts and others have essentially found that a law's indirect effect on a plan does not necessitate its preemption because of the "relate to" clause. In other words, there must be more than a tenuous or remote relationship between the law in question and the plan in order for the law to be preempted. Otherwise, the words of Congress in enacting the McCarran-Ferguson Act are rendered meaningless.

This Court has denied *certiorari* in these lines of cases, leaving doubt as to the proper analysis to be applied by courts in adjudging controversies. This case presents the Court with the opportunity to resolve the confusion.

III. ERISA "SAVING" CLAUSE

The ERISA "saving" clause reads as follows: "Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be

engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." 29 U.S.C. § 1144(b)(2)(A).

This Court has previously reviewed the ERISA "saving" clause and has concluded that a common sense understanding of the term "regulate insurance" should first be applied and then the McCarran-Ferguson Act test should be applied to determine whether the law in question regulates the business of insurance. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 743 (1985). If one scrutinizes the decision of this Court in *Pilot Life*, one concludes that the McCarran-Ferguson Act test alone does not address the application of preemption to litigants which are not specifically listed in ERISA. It is not rational to conclude that Congress intended to preempt all remedies available under state law to a non-fiduciary employer-sponsor of a plan, where no remedies are cited under the exclusive remedy provisions of ERISA.

Furthermore, this Court has held that "the saving clause retains the independent effect of protecting state insurance regulation of insurance contracts purchased by employee benefits plans." *FMC Corp. v. Holliday*, 498 U.S. 52, 64 (1990). Application of that holding to the instant case would result in the correct approach, which would permit Petitioner to pursue its state law remedies and would halt the expansion of ERISA preemption into areas not contemplated in ERISA.

IV. ERISA "DEEMER" CLAUSE

The ERISA "deemer" clause limits the effect of the "saving" clause stating that " . . . no employee benefit plan shall be deemed to be an insurance company or other insurer . . . or . . . engaged in the business of insurance . . . for purposes of any law of any state purporting to regulate insurance companies [or] insurance contracts." 29 U.S.C. § 1144(b)(2)(B).

This Court interpreted the "deemer" clause to exempt from state laws that regulate insurance ERISA plans. However, this Court also found that state laws that "directly regulate insurance are 'saved' but do not reach self-funded employee benefits plans because the plans may not be deemed to be insurance companies . . . " *FMC Corp. v. Holliday,* 498 U.S. 52, 61 (1990).

The question here relates to the characteristics of a self-funded plan. A self-funded plan, by definition, is not an insured plan. The difficulty arises when a plan is an insured plan, but the employer-sponsor retains some risk itself. Notwithstanding the holding of this Court in *FMC Corp.*, the "deemer" clause has been applied to plans that were insured, but where the employer-sponsor retained some of the risk. The Fourth Circuit applied the "deemer" clause to the plan at issue here finding that it was "self-funded for the most part." *Tri-State Machine,* 33 F.3d at 315. The Sixth Circuit, by contrast, has held that the existence of any insurance on its face means a plan is not self-funded. *See, e.g., Northern Group Services, Inc. v. Auto*

Owners Ins. Co., 833 F.2d 85 (6th Cir. 1987), *cert. denied*, 86 U.S. 1017 (1988).[3]

This case provides an opportunity for this Court to clarify its holding in *FMC Corp.* and emphasize that where any risk under a plan is insured, state law may be invoked to remedy claims which arise from the insurance policy, and that the "deemer" clause is not applicable to insurance companies in the sale of insurance policies.

CONCLUSION

The implications raised by the issues in this case are far-reaching in several respects.

First, the diverse decisions of many courts in attempting to rationalize the cited ERISA provisions with the supremacy of the States to regulate the business of insurance have resulted in conflicting, sometimes contradictory and confusing results. There is no guidance to resolutions of controversies at the trial court or the intermediate appellate court levels. Resolution of these issues by this Court will provide needed guidance for courts as well as prospective litigants.

Second, ERISA was intended to encourage and facilitate creation of employer-sponsored benefit plans for employees. The Fourth Circuit's interpretation of ERISA has the opposite result. Employers are discouraged from

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[3] The holding in *Northern Group* was limited; however, the situation differed from the situation in the instant case, one in which the employer-sponsor purchased insurance to fund the employee benefit plan. See *Lincoln Mut. Casualty Co. v. Lectron Products, Inc. Employee Health Plan*, 970 F.2d 106 (6th Cir. 1992).

creating such plans because when insurance policies are purchased to fund all or part of the plan, the employers are not protected by ERISA from unfair trade practices by insurance companies. ERISA was not intended to and does not provide such protections and, indeed, there is no accountability for insurers engaging in such practices.

Finally, there is broad-based, diverse support in the United States now for health care reform and, more importantly for this case, for employer-sponsored and provided health insurance. The trend indicated by the Fourth Circuit's decision expands inappropriately the force of the ERISA preemption so broadly as to apply to transactions unintended by Congress. Continuation of this trend will serve to undermine the efforts to secure health care reform through employer-sponsored health benefits.

The NAIC, as *amicus curiae*, respectfully requests the Court to grant the writ of *certiorari* in this case and to reaffirm that regulation of the business of insurance is reserved exclusively to the States and that ERISA preemption does not prevent the States from providing the consumer protection contemplated by unfair trade practices laws applicable to insurers.

Respectfully submitted,

Susan E. Martin, Esq.
General Counsel for the National Association of Insurance Commissioners
120 West 12th Street, Suite 1100
Kansas City, MO 64105
(816) 842-3600

APPENDIX

CONSTITUTION

ARTICLE I. NAME.

This organization shall be known as the National Association of Insurance Commissioners (NAIC).

ARTICLE II. OBJECTIVE.

The objective of this body is to serve the public by assisting the several State insurance supervisory officials, individually and collectively, in achieving the following fundamental insurance regulatory objectives:

(1) Promotion of the public interest through the regulation of insurance and the fair, just and equitable treatment of insurance consumers and claimants;

(2) Reliability of the insurance institution as to solvency, financial solidity and guaranty against loss; and

(3) Maintenance and improvement of State regulation of insurance in a responsive and efficient manner.

ARTICLE III. MEMBERSHIP.

The membership of the NAIC shall consist of the Commissioners, Directors, Superintendents, or other officials who by law are charged with the principal responsibility of supervising the business of insurance within each State, territory, or insular possession of the United States. Members only shall be eligible to hold office in and serve on Committees and Subcommittees of the NAIC. However, a member may be represented on a Committee or

Subcommittee by the member's duly authorized representative as defined in ARTICLE VII. Each State, territory or insular possession shall be limited to one vote. Any insurance supervisory official of a foreign government or any subdivision thereof, which has been diplomatically recognized by the United States government, may attend and participate in all meetings of this Congress but shall not have the power to vote.

Members failing to pay all NAIC assessments on a timely basis, as prescribed by the Bylaws, shall be placed in an inactive status. Members in an inactive status shall be denied membership on NAIC committees and task forces, access to mailings and services of the NAIC Support and Services Office, as well as access to zone examination processes and other benefits of membership in the NAIC.

Receipt of full payment from the inactive member of all current and past due assessments shall serve to immediately remove them from the inactive status.

The Executive Committee is empowered to reinstate, in part or in whole, an inactive member's participation on the committees and task forces, access to mailings and services of the NAIC Support and Services Office, as well as access to zone examination processes, and other benefits of membership in the NAIC upon good cause shown as determined by the Executive Committee.

ARTICLE IV. ZONES.

To accomplish the purposes of the NAIC in a timely and efficient manner, the United States, its territories and insular possessions shall be divided into four Zones. Each

Zone shall consist of a group of at least eight States, located in the same geographical area, with each State being contiguous to at least one other State in the group so far as practicable, plus any territory or insular possession that may be deemed expedient, all as determined by majority of the Executive Committee. Members of each Zone shall annually elect a Chairman, a Vice Chairman and a Secretary from among themselves prior to or during the Winter Meeting of the NAIC. The Chairman, Vice Chairman and Secretary of each Zone shall be members of the Executive Committee with terms of office corresponding to that of the officers. Each Zone shall perform such functions as are designated by the Executive Committee of the NAIC or by the members of the NAIC as a whole or by the members of the Zone. Each Zone may hold Zone Meetings for such purposes as may be deemed appropriate by members of the Zone. Zone Meetings may be held at the discretion of the Zones as long as the meeting is not held within thirty (30) days of a National Meeting or within twenty-one (21) days of a previously scheduled Zone Meeting.

ARTICLE V. MEETINGS.

The NAIC shall hold at least four (4) National Meetings each calendar year at such time and place as the Executive Committee may designate; provided that each Zone shall be the site of one National Meeting every two years. Special plenary sessions may be called by any five (5) members of the Executive Committee by giving all members notice of such meeting at least ten (10) days prior thereto, or by any twenty (20) members of the NAIC upon thirty (30) days notice to all members. Actions at

any special plenary sessions shall be limited to the object stated in the notice therefor. At any meeting of the NAIC, one or more of the sessions may be Executive Sessions. Any member may attend and participate in any meeting of the NAIC or any meeting of a Committee or Task Force whether or not such member has the right to vote. All National Meetings shall provide for a Plenary Session of the NAIC as a whole in order to consider and take action upon the matters submitted to the NAIC.

ARTICLE VI. QUORUM.

A quorum for the transaction of business shall consist of a majority of the members.

ARTICLE VII. VOTING.

Each member of the NAIC shall have the power to vote and otherwise participate in the affairs of the NAIC provided, however, no State, territory or insular possession shall have more than one vote. This power may be exercised through a duly authorized representative who shall be a person officially connected with the member's department and is wholly or principally employed by said department. Any delegation of power to vote or participate in the affairs of the Plenary Session, Executive Committee or Standing Committee of the NAIC during the regular meetings of the NAIC must be in writing.

ARTICLE VIII. OFFICERS.

The officers of the NAIC shall be a President, a Vice President who shall serve as Chairman of the Executive

Committee, and a Recording Secretary. The officers shall be elected by secret ballot at the last National Meeting of the calendar year and shall take office at the close of such meeting. They shall hold office until the election and qualification of their successors. No member may hold the office of President or Vice President – Chairman of the Executive Committee – for more than two consecutive years.

ARTICLE IX. EXECUTIVE COMMITTEE.

(1) Structure and Composition.

(a) There shall be an Executive Committee consisting of the officers of the NAIC; the most immediate past President who shall be Vice Chairman of the Executive Committee; the twelve (12) members of the zones as provided in ARTICLE IV; and all other past presidents who have continuously remained members of the NAIC since completing their terms in the office of NAIC president.

(b) Vacancies in the office of President, Vice President or Recording Secretary may be filled by the Executive Committee for the remaining period until the next Plenary Session of the NAIC. In the event of such vacancy, the Chairman of the Executive Committee, or in case of his inability to act from any cause, the Vice Chairman, or if he is unable, the President, may call a meeting of or conduct a mail ballot among the members of the Executive Committee to fill such vacancy until the next Plenary Session of

the NAIC. If the vacancy is that of Chairman of the Zone, Vice Chairman of the Zone or Secretary of the Zone, the Chairman of the Zone, or in his absence, the Vice Chairman, shall immediately call a meeting of or conduct a mail ballot among the members of the Zone to fill such vacancy. In the event the immediate past President is unable, for any reason, to act as Vice Chairman of the Executive Committee, the membership of the Executive Committee shall elect one of their number to act as Vice Chairman, but no vacancy on the Executive Committee shall result from such inability of the immediate past President or from such election of a member to act as Vice Chairman.

(2) General Authority and Responsibility.

The Executive Committee shall have the authority and responsibility to:

(a) make recommendations to achieve the goals of the NAIC based upon either its own initiative or the recommendations of the Standing Committee or Subcommittees reporting to it, for consideration and action by the members at any NAIC Plenary Session;

(b) manage the affairs of the NAIC in a manner consistent with the Constitution and Bylaws;

(c) create and terminate one or more Task Forces reporting to it to the extent needed and appropriate;

(d) establish and allocate, from time to time, functions and responsibilities to be performed by each Zone;

(e) establish, to the extent needed and appropriate, and oversee in accordance with the Bylaws, a Support and Services Office to assist the NAIC and the individual members in achieving the goals of the NAIC;

(f) submit to the NAIC at each National Meeting, during which a Plenary Session is held, its report and recommendations concerning the reports of the Standing Committees. All Standing Committee reports shall be included as part of the Executive Committee report;

(g) plan, implement and coordinate communications and activities with other state, federal and local government organizations in order to advance the goals of the NAIC and promote understanding of state insurance regulation.

ARTICLE X. BYLAWS.

The Bylaws of the NAIC may prescribe the powers and duties of the several officers and Committees of the NAIC and such rules as may be necessary for the work of the NAIC provided they are in conformity with this Constitution.

ARTICLE XI. AMENDMENTS.

This Constitution may be altered or amended at any Plenary Session of the NAIC by an affirmative vote of

two-thirds of the members qualified to vote, or their authorized representatives, provided that previous notice of the proposed amendment has been mailed to all members by direction of the Executive Committee at least thirty (30) days prior to the meeting.

Adopted 1981 Proc. I p. 41
Amended 1981 Proc. II p. 27
Amended 1984 Proc. II p. 14
Amended 1985 Proc. I p. 32
Amended 1989 Proc. II p. 11
Amended 1993 Proc. Second Quarter p. 6
Amended 1994 Proc. Second Quarter